

**A Sundarajan a/l Sokalingam v Fredrick Indran a/l XA Nicholas
o/b Perak Bar Committee (Malaysian Bar Council, intervener)**

**B HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 25–22–08
OF 2013
LEE SWEE SENG J
26 JUNE 2014**

**C *Legal Profession — Disciplinary proceedings — Disciplinary Board
— Applicant arranged for someone to ‘stand in’ for client in criminal trial to
deceive court into thinking substituted person was accused — Applicant convicted
for offence of s 419 of the Penal Code for cheating by impersonation and sentenced
to six months imprisonment — Allegation Chairman of Bar Council member of
D Disciplinary Board made decision — Whether decision ultra vires***

The respondent, the Chairman of the Perak Bar, had lodged a complaint against the applicant with the Advocates and Solicitors Disciplinary Board (‘the DB’) based on what was reported in the press. It was alleged that the applicant apparently arranged for someone to ‘stand in’ for his client, an accused person, in a criminal trial with a view to deceiving the sessions court judge into thinking that the substituted person was the accused. The DB constituted an investigating tribunal (‘the IT’) under the Legal Profession Act 1976 (‘the LPA’) to investigate the complaint. The IT recommended a formal investigation by a disciplinary committee (‘DC’) of the complaint. The DB appointed the DC. The applicant was the respondent before the DC. The applicant was convicted in the sessions court for an offence under s 419 of the Penal Code for cheating by impersonation and was sentenced to six months imprisonment. The High Court affirmed the conviction and sentence on appeal. The applicant further appealed to the Court of Appeal which dismissed the appeal. The applicant then served sentence from 22 February 2011 for six months. The DC delivered its report to the DB recommending that the applicant be suspended for three months and be fined RM8,000. The DB heard further submissions from the applicant and delivered its decision under s 103D of the LPA against the applicant and suspended the applicant for 12 months. The applicant now sought to set aside the whole of the DB’s decision and the report of the DC on the grounds that the decision of the DB to constitute an IT was null and void as the Chairman of the Bar Council was a member of the DB that made the decision, in a case where the Bar Council was effectively the complainant; that the report of the DC being submitted to the director of the DB out of the prescribed time, was null and void; that the report of the DC being signed by the chairman and members of the DC after their term had expired, was null and void; that the DB acted ultra vires in requiring the respondent below to submit under s 94(3)(a) of the LPA with respect to a

criminal conviction when the complaint was not on a criminal conviction but the conduct of the respondent. A

Held:

- (1) The complaint was not from the Bar Council but from the then Perak Bar Chairman. The chairman of course, was a Bar Council member but the Bar Council and the State Bar Committees are separate entities. The complaint did not get converted into that of the Bar Council merely because a member of the Bar Council in the person of the State Bar Committee Chairman had complained. Thus there was nothing improper for the President of the Bar Council to be present in the DB when the decision was made to constitute the IT. In any event the objection should be raised and an application made to the court before the IT commenced its hearing. That was not done. The applicant had acquiesced in it and had participated in the proceedings without raising any objection. It was too late in the day to complain especially after the DB had deliberated and made a finding of misconduct and meted out the punishment (see paras 12–13). B C D
- (2) When a statute uses ‘shall’ prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. The whole scope of the part of the LPA on disciplinary procedure against an advocate and solicitor was to ensure that public interest was protected and that public confidence in the legal profession was not compromised. It is to ensure that the Bar sets for itself a high ethical standard and that errant lawyers are punished for their misconduct (see paras 18 & 29). E F
- (3) The auxiliary verb ‘shall’, when used in the context of r 26(2) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules must be read as directory. The object of the LPA should not be allowed to be thwarted merely on ground of a failure of the DC to submit its report on time. It might be appreciated that the time frame itself under r 26(3) provided for extension of time by the chairman of the DB. If the time frame were mandatory, one would have expected the time frame for submission of the DC’s report to be clearly spelled out in the Act rather than just in the Rules. However, the LPA does not prescribe a fixed time frame for the report of the DC to be concluded and sent to the director. It was content to condescend to the expression to ‘expeditiously report its findings to the Disciplinary Board’ as was used in the LPA (see para 30). G H I
- (4) Under the scheme of discipline and investigation into misconduct under the LPA, the time limits set for various stages of investigation are designed not to fetter its public purpose but to facilitate a speedy process of fact-finding and investigation so that the DB, being properly appraised,

- A might proceed to mete out the necessary punishment for misconduct. The delay did not, in any way, prejudice the applicant who continued to practise law as he applied for and was given the *Sijil* annual throughout that period of hearing of the DC (see para 39).
- B (5) The applicant had apparently applied for and obtained a stay of execution of his sentence whilst pursuing his appeal against the criminal conviction. It was after all avenues of appeal had been exhausted that finally he had to serve sentence, which he did for six months. If the DB had wanted to proceed when he had obtained a stay of the sentence, he
- C would have objected on ground that if he should succeed on appeal, he would have suffered a severe prejudice especially if the DB had found him guilty and suspended him from practice for a period of time. Upon his release, the complaint was more than ripe for disposal, for by then the applicant had no good excuse that he might well succeed on appeal
- D against his conviction by the sessions court (see paras 39–40).
- (6) It would not become void if a member of the DC or even all its members have ceased to be members when the report was signed off. The chairman and the members of the DC had valid appointment and authority when
- E they heard the complainant and the applicant. There was no suggestion that their term had expired when they heard the parties and completed their investigation. Even in a case of incapacity of a member of the IT of DC, any delay in the beginning or completion of any investigation shall not render void any hearing or any investigation, report or
- F recommendation made by the IT or DC, as the case may be under r 27 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 (see para 46).
- (7) The DB was perfectly entitled to consider the report and
- G recommendation of the DC which investigation was completed during the period of validity of their appointments as members of the DC though their term had expired when they signed off the report. The DB did not cease to have jurisdiction to consider the said report of the DC which was in the nature of a recommendation based on findings of fact that the members of the DC had vouched for. To say that the DB could only decide on the complaint on the conduct of the applicant without
- H wanting to take into consideration the subsequent conviction, was to allow for artificial compartmentalisation of the conduct of the lawyer complained against when in reality the same conduct had evolved into a conviction with no change in substance. There was no basis for arguing
- I then that the DB had by so considering the conviction, acted ultra vires (see paras 48, 52–53).

[Bahasa Malaysia summary]

Responden, Pengerusi Majlis Peguam Perak, telah membuat aduan terhadap pemohon bersama Lembaga Tatatertib Peguamcara dan Peguambela ('LT') berdasarkan apa yang telah dilaporkan di dalam akhbar. Adalah dikatakan bahawa pemohon telah mengaturkan untuk seseorang 'stand in' untuk anak guamnya, dalam perbicaraan jenayah dengan niat untuk memperdaya hakim mahkamah sesyen untuk memikirkan bahawa orang yang menggantikan itu adalah tertuduh. LT menubuhkan tribunal penyiasatan ('TP') di bawah Akta Profesion Undang-Undang 1976 ('APU') untuk menyiasat aduan itu. TP mencadangkan siasatan formal oleh jawatankuasa tatatertib ('JT') terhadap aduan itu. LT melantik JT. Pemohon adalah responden di hadapan JT. Pemohon telah disabitkan di mahkamah sesyen atas kesalahan di bawah s 419 Kanun Keseksan kerana menipu dengan penyamaran dan dihukum enam bulan penjara. Mahkamah Tinggi mengesahkan sabitan dan hukuman pada rayuan. Pemohon selanjutnya memohon ke Mahkamah Rayuan yang mana rayuan itu ditolak. Pemohon kemudiannya menjalani hukuman dari 22 Februari 2011 selama enam bulan. JT menyerahkan laporannya kepada LT mencadangkan bahawa pemohon digantung selama tiga bulan dan didenda RM8,000. LT mendengar serahan selanjutnya daripada pemohon dan membuat keputusannya di bawah s 103D APU terhadap pemohon dan menggantung pemohon selama 12 bulan. Pemohon kini memohon untuk mengetepikan keseluruhan keputusan LT dan laporan JT atas alasan bahawa keputusan LT untuk menubuhkan TP adalah terbatal dan tidak sah kerana Pengerusi Majlis Peguam adalah ahli LT yang telah membuat keputusan itu, dalam kes di mana Majlis Peguam merupakan pengadu; bahawa laporan JT yang dikemukakan kepada Pengarah LT di luar masa yang ditentukan, adalah batal dan tidak sah; bahawa laporan JT yang ditandatangani oleh Pengerusi dan ahli-ahli JT selepas terma mereka tamat, adalah batal dan tidak sah; bahawa JT bertindak ultra vires kerana meminta responden untuk dikemukakan di bawah s 394(3)(a) APU berkenaan sabitan jenayah bila aduan bukanlah untuk sabitan jenayah tetapi akan kelakuan reponden.

Diputuskan:

- (1) Aduan bukanlah daripada Majlis Peguam tetapi daripada Pengerusi Majlis Peguam Perak. Pengerusi itu, sememangnya, adalah ahli Majlis Peguam tetapi Majlis Peguam dan Jawatankuasa Majlis Peguam Negeri adalah entiti yang berasingan. Aduan tidak ditukar diadukan oleh Majlis Peguam hanya kerana seorang ahli Majlis Peguam iaitu Pengerusi Jawatankuasa Majlis Peguam telah mengadu. Oleh itu tiada apa yang kurang wajar bagi Presiden Majlis Peguam untuk hadir di dalam LT apabila keputusan dibuat untuk menubuhkan TP. Dalam apa-apa keadaan bantahan haruslah dibangkitkan dan suatu permohonan dibuat ke mahkamah sebelum TP memulakan perbicaraannya. Ia tidak dilakukan. Pemohon telah bersetuju dengan perkara itu dan telah

- A mengambil bahagian dalam prosiding itu tanpa menimbulkan sebarang bantahan. Adalah sudah terlewat untuk mengadu terutama selepas LT telah membincangkan dan membuat dapatan salah laku dan dijatuhkan hukuman (lihat perenggan 12–13).
- B (2) Apabila suatu statut menggunakan ‘shall’ ia adalah prima facie mandatori, tetapi mahkamah boleh menentukan tujuan sebenar Badan Perundangan dengan secara berhati-hati menilai keseluruhan skop statut. Keseluruhan skop APU pada bahagian prosedur tatatertib terhadap seorang peguamcara dan peguambela adalah untuk memastikan bahawa kepentingan awam dilindungi dan keyakinan awam terhadap profesion undang-undang tidak dikompromi. Ia adalah untuk memastikan Majlis Peguam meletakkan sendiri standard dan etika yang tinggi dan bahawa peguam yang menyeleweng dihukum untuk salah laku mereka (lihat perenggan 18 & 29).
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- D (3) Kata kerja bantu ‘shall’, apabila digunakan dalam konteks k 26(2) Kaedah-Kaedah Profesion Undang-Undang (Prosiding Tatatertib) (Tribunal dan Jawatankuasa Tatatertib Penyiasat) perlu dibaca sebagai panduan. Objek APU tidak boleh dibenarkan untuk gagal semata-mata atas alasan kegagalan JT untuk mengemukakan laporannya tepat pada masa. Ia mungkin sedia maklum bahawa tempoh masa itu sendiri di bawah k 26(3) memperuntukkan untuk lanjutan masa oleh Pengerusi JT. Jika tempoh masa itu ialah mandatori, seseorang akan telah menjangkakan tempoh masa bagi penyerahan laporan JT itu untuk dinyatakan dengan jelas dalam Akta dan bukan hanya dalam Kaedah-Kaedah. Walau bagaimanapun, APU tidak menetapkan jangka masa tertentu untuk laporan JT disimpulkan dan dihantar kepada pengarah. Ia adalah kandungan untuk menerangkan dengan lebih mendalam kepada pernyataan ‘expeditiously report its findings to the Disciplinary Board’ sebagaimana yang digunakan di dalam APU (lihat perenggan 30).
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- G (4) Di bawah skim tatatertib dan penyiasatan salah laku di bawah APU, had masa yang ditetapkan untuk pelbagai peringkat tidak dibuat untuk membelenggu tujuan awamnya tetapi untuk membantu mempercepatkan proses dapatan fakta dan penyiasatan supaya JT, yang dapat menilai dengan betul, boleh meneruskan untuk menjatuhkan hukuman yang perlu terhadap salah laku. Kelewatan itu tidak, dalam apa-apa cara sekalipun, memprejudis pemohon yang terus mengamalkan undang-undang seperti mana yang telah dia pohon dan telah diberikan Sijil Annual sepanjang tempoh perbicaraan JT (lihat perenggan 39).
- H
- I (5) Pemohon rupanya telah memohon untuk dan mendapatkan pelaksanaan penangguhan terhadap hukumannya sementara meneruskan rayuannya terhadap sabitan jenayah. Adalah selepas semua ruang untuk rayuan telah tiada barulah dia akhirnya menjalani hukuman, yang mana dijalaninya

selama enam bulan. Jika JT mahu untuk meneruskan apabila dia telah mendapatkan penangguhan hukuman, dia akan membantah atas alasan bahawa jika dia berjaya terhadap rayuan, dia akan mengalami prejudis yang teruk terutama jika JT telah mendapatinya bersalah dan menggantungnya daripada beramal untuk tempoh masa tertentu. Apabila dia dibebaskan, aduan itu sudah menjadi matang untuk diselesaikan, oleh itu pemohon tidak mempunyai alasan yang baik bahawa dia mungkin berjaya pada rayuan terhadap sabitan oleh mahkamah sesyen (lihat perenggan 39–40).

- (6) Ia tidak menjadi terbatal jika seorang ahli JT atau kesemua ahlinya bukan lagi ahli apabila laporan ditandatangani. Pengerusi dan ahli-ahli JT mempunyai pelantikan yang sah dan autoriti apabila mereka mendengar pengadu dan pemohon. Tiada cadangan bahawa terma mereka sudah tamat apabila mereka mendengar pihak-pihak dan menyelesaikan penyiasatan mereka. Malah dalam kes ketidakupayaan TP kepada JT, apa-apa kelewatan pada permulaan atau penutupan terhadap apa-apa siasatan tidak akan menjadikan apa-apa perbicaraan atau siasatan tidak sah, laporan atau cadangan dibuat oleh TP atau JT, mengikut mana-mana yang berkenaan di bawah r 27 Kaedah-Kaedah Profesion Undang-Undang (Prosiding Tatatertib) (Tribunal dan Jawatankuasa Tatatertib Penyiasat) 1994 (lihat perenggan 46).
- (7) LT berhak sepenuhnya untuk mempertimbangkan laporan dan cadangan JT yang mana siasatan telah selesai pada tempoh sah pelantikan mereka sebagai ahli JT walaupun terma mereka telah tamat apabila mereka menandatangani laporan. LT tidak berhenti untuk mempunyai bidang kuasa untuk mempertimbangkan laporan JT yang mana bentuk cadangan berdasarkan dapatan fakta yang disahkan oleh ahli JT. Untuk mengatakan bahawa LT hanya boleh memutuskan aduan terhadap kelakuan pemohon tanpa mahu mempertimbangkan sabitan seterusnya, adalah untuk membenarkan pemetakan tiruan terhadap kelakuan peguam yang aduan dibuat atasnya apabila dalam realiti kelakuan yang sama telah berkembang menjadi sabitan tanpa perubahan dalam keterangan. Tiada asas untuk berhujah bahawa LT dengan mempertimbangkan sabitan, bertindak ultra vires (lihat perenggan 48, 52 & 53).]

Notes

For cases on Disciplinary Board, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1502–1505.

Cases referred to

Charles v Judicial and Legal Service Commission & Anor (Jamaica) [2002] UKPC 34, PC (refd)

- A** *Dato' Dr Henry Ooi Kwee Lim v Majlis Perubatan Malaysia* [2013] 8 MLJ 151, HC (refd)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 CLJ 878, CA (refd)
Law Society of Singapore v Zulkifli bin Mohd Amin and another matter [2011] 2 SLR 620, HC (refd)
- B** *Majlis Peguam & Anor v Tan Sri Dato' Mohamed bin Yusoff Mohamed* [1997] 2 MLJ 271; [1997] 3 CLJ 332, SC (refd)
Malaysian Bar v Dato' Kanagalingam all Veluppilai [2004] 4 MLJ 153; [2004] 5 AMR 441, FC (refd)
- C** *New Zealand Institute of Agriculture Science Inc v Ellesmere County* [1976] 1 NZLR 630, CA (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153, FC (refd)
Ngeow Yin Ngee v Majlis Peguam Malaysia [2004] 6 MLJ 457; [2004] 3 AMR 476, HC (refd)
- D** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, HC (refd)
R v Soneji and another [2005] UKHL 49, HL (refd)
Sri Palmar Development & Construction Sdn Bhd v Jurukur Perunding Services Sdn Bhd [2010] 6 MLJ 166, HC (refd)
- E** *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, CA (refd)

Legislation referred to

Courts of Judicature Act 1961 s 72

Evidence Act 1950 s 114(g)

- F** Legal Profession Act (Cap 161, 2009 Rev Ed) [SG] s 87(1A)
Legal Profession Act 1976 ss 87(1A), 94(1), (2), (3)(a), 93(4C), 96, 103B(1), 103D
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 rr 4(1), 26, 26(2), (3), 27
- G** Penal Code s 419

Sundarajan a/l Sokalingam (in person) (V Stanislaus and Sakthivel with him) (Vethanayagam & Assoc) for the applicant.

Ong Yu Shin (G Shanmugam with him) (Mureli Navaratnam) for the intervener.

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Lee Swee Seng J:

[1] The respondent here was the Chairman of the Perak Bar. He had lodged a complaint on 2 October 2004 with the Advocates and Solicitors Disciplinary Board ('the DB') on what was reported in the press with respect to the applicant apparently arranging for someone to 'stand in' for his client, an accused person in a criminal trial with a view to deceiving the sessions court judge into thinking that the substituted person is the accused. One can imagine what would have happened if the switch had not be discovered. A different person

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could be arranged to serve the accused person's prison term! The incident took place in the Ipoh Sessions Court on 27 September 2004. A

[2] DB decided to constitute an investigating tribunal ('the IT') under the Legal Profession Act 1976 ('the LPA') on 8 May 2008 to investigate the complaint. The IT wrote on 22 September 2008 to the applicant. The IT heard the parties on seven occasions from 27 September 2008 and concluded its hearing on 16 May 2009. Three witnesses appeared before the IT ie the complainant, the interpreter on duty in court and the sessions judge hearing the case. The applicant called himself alone. B C

[3] The IT in its report of 1 July 2009 recommended a formal investigation by a disciplinary committee ('DC') of the complaint. The DB appointed the DC on 3 May 2010 and the hearing was on 22 July 2010 and 18 August 2010. The DC's report to the DB was dated 15 March 2013. D

[4] It is to be noted that the applicant's counsel Mr Stanislaus submitted as follows before the DC:

I humbly submitted that this committee should make a decision after the decision of the appeal. What transpired in court is important to the Respondent. E

The applicant here was the respondent before the DC.

[5] Meanwhile the applicant was convicted in the sessions court on 3 August 2009 for an offence under s 419 of the Penal Code for cheating by personation and was sentenced to six months imprisonment. The High Court affirmed the conviction and sentence on appeal. The applicant further appealed to the Court of Appeal which dismissed the appeal on 22 February 2011. The applicant then served sentence from 22 February 2011 for six months. F G

[6] The DC delivered its report to the DB on 15 March 2013. It recommended that the applicant be suspended for three months and be fined RM8,000. On 17 June 2013 the DB heard further submissions from the applicant. On 20 July 2013 the DB delivered its decision under s 103D of the LPA against the applicant and suspended the applicant for 12 months. H

PRAYER

[7] The applicant now seeks to set aside the whole of the DB's decision and the report of the DC. The grounds for setting aside the DB's decision are, inter alia, as follows: I

- A (a) that the decision of the DB to constitute an IT is null and void as the chairman of the Bar Council was a member of the DB that made the decision, in a case where the Bar Council is effectively the complainant;
- B (b) that the report of the DC being submitted to the director of the DB out of the prescribed time, is null and void;
- (c) that the report of the DC being signed by the chairman and members of the DC after their term had expired, is null and void; and
- C (d) that the DB acted ultra vires in requiring the respondent below to submit under s 94(3)(a) of the LPA with respect to a criminal conviction when the complaint was not on a criminal conviction but the conduct of said respondent.

D *Whether the chairman of the Bar Council can be in the DB that appointed the IT when the complainant is a member of the Bar Council, being the Chairman of the Perak State Bar Committee at that time*

E [8] The applicant contended that the then chairman of the Bar Council, Mr Kuthubal Zaman, sat in the DB that decided to constitute the IT to investigate the complaint. This, it was contended, was fatal even though Mr Kuthubal did not sit in the DB that deliberated on the report of the DC and that decided on the finding of guilt and sentence imposed.

F [9] The contention that the decision is null and void arises from a breach of rules of natural justice. That is underscored by the provision of r 4(1) of the Legal Profession (Disciplinary Board)(Procedure) Rules 1994 as follows:

4 Disqualification of member [PU(A) 189/94]

G (1) Where the *Bar Council is the complainant* or where the Bar Council intervenes under rule 8 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, *the President of the Bar Council* or his alternate, as the case may be, *shall be disqualified* as member of the *Disciplinary Board* for the purposes of the *quorum*. (Emphasis added.)

H Section 93(4C) of the LPA also provides as follows:

The Chairman of the Disciplinary Board, the President of the Malaysian Bar and any other member of the Disciplinary Board shall, where it is necessary in the interest of justice, disqualify himself from deliberating on any complaint.

I [10] Reliance was placed on the case of the *Malaysian Bar v Dato' Kanagalingam a/l Veluppilai* [2004] 4 MLJ 153 at p 159; [2004] 5 AMR 441 at p 447 where Hashim bin Yusoff JCA (later FCJ) observed as follows:

When the respondent requested from the DB for the names of the members of the DB who sat and decided to institute the investigating tribunal, the DB refused to

entertain his request by saying that it was not in a position to disclose the same. Surely such a reply would arouse strong suspicion as to why the DB refused to disclose the names as requested by the respondent. Yet in the case of *Ngeow Yin Ngee v Majlis Peguam Malaysia* [2004] 6 MLJ 457; [2004] 3 AMR 476; [2004] 5 CLJ 467 at the request of the appellant the DB had in fact furnished the appellant (lawyer) with the names of the DB members who sat in the DB meeting after the DB had made the order against the appellant. Why then could the DB not have provided the same in the instant appeal when requested by the respondent? Therefore we think the High Court was not in error when it invoked s 114(g) of the Evidence Act against the appellant under the circumstances, thus raising the presumption that the president of the Bar Council or his alternate was present at the said meeting.

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[11] Whilst *Dato' Kanagalingam's* case was in respect of vitiating the decision of the DB at the initial stage of deciding to constitute an IT to investigate into a complaint made by the Bar Council, *Ngeow Yin Ngee v Majlis Peguam Malaysia* [2004] 6 MLJ 457; [2004] 3 AMR 476 was with respect to the presence of the Vice-President of the Malaysian Bar at the DB's meeting that rejected the findings of the IT and DC in a complaint pursued by the Bar Council after the complainant had withdrawn the complaint. At p 462 (MLJ); p 481–482 (CLJ), His Lordship Zulkefli bin Ahmad Makinudin J (now CJM) observed as follows:

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... To my mind the intent and purport of the aforesaid r 4(1) of the DB Rules is very clear and in the present case since the complaint was a complaint taken over by the Bar Council under r 8 of the DC Rules, the vice-president of the Bar Council as the 'alternate', had clearly contravened r 4(1) of the DB Rules and that his presence at those meetings of August 28 1999, February 14 2001 and February 8 2002 was clearly in breach of the principles of natural justice ie that 'no man shall be a judge in his own cause'. The case of *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 may be cited as an authority for the above proposition wherein in this case His Lordship Edgar Joseph Jr J, (as he then was), inter alia, held that the proceedings before the disciplinary authority were contrary to natural justice owing to the presence of the registrar of the respondent university, the complainant in the case of both the applicants, during the disciplinary deliberations. In this case it was also found that the registrar was very far from being a mere nominal complainant and had shown active participation in the proceedings before the disciplinary authority.

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Taking into consideration the facts and circumstances of the case as a whole I am of the view it would be difficult to accept that there had been no opportunity for members of the DB to be influenced in their judgment, even assuming that the vice-president was merely present at the said meeting and did not take part in the deliberations. It would appear that justice may seem not to have been done. On this point I would like to refer to the case of *Cooper v Wilson* [1937] 2 KB 309 wherein His Lordship Scott LJ at p 344 had this to say:

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It makes no difference whether he then discussed the case with them or not; the risks that a respondent may influence a court is so abhorrent to English notions

A of justice that the possibility of it or even the appearance of such possibility is sufficient to deprive a decision of all judicial force, and to render it a nullity.

For the reasons above stated, the appeal is allowed with costs and the order of the DB under s 103 of the Act is hereby set aside.

B [12] With respect, what has been overlooked here is that the complaint is not
C from the Bar Council but from the then Perak Bar Chairman. The chairman of
course is a Bar Council member but the Bar Council and the State Bar
Committees are separate entities. The complaint does not get converted into
that of the Bar Council merely because a member of the Bar Council in the
person of the State Bar Committee Chairman had complained. Thus there was
nothing improper for the president of the Bar Council to be present in the DB
when the decision was made to constitute the IT.

D [13] In any event the objection should be raised and an application made to
E court before the IT commences its hearing. That was not done. The applicant
had acquiesced in it and had participated in the proceedings without raising
any objection. It is too late in the day to complain especially after the DB had
deliberated and made a finding of misconduct and meted out the punishment.

F [14] Even assuming for a moment that it was wrong for the chairman of the
Bar Council to have sat in the deliberation of the DB to constitute an IT, the
seriousness of the allegation against the respondent below was such that, it
would be most reasonable for any DB, with or without the chairman of the Bar
Council, to have decided that an IT be constituted to investigate the
complaint.

*Whether the DB can rely on the report of the DC that took longer than two months
to complete its report to the DB and submitted it only 2 1/2 years later*

G [15] Section 103B(1) of the Legal Profession Act 1976 provides as follows:
The Disciplinary Committee shall, within one month of its appointment,
commence its investigation into the written application or complaint and
H *expeditiously report its findings to the Disciplinary Board.* (Emphasis added.)

[16] Rule 26 of the Legal Profession (Disciplinary Proceedings)
(Investigating Tribunal and Disciplinary Committee) Rules 1994, provides as
follows:

I (1) The report of the Disciplinary Committee shall state the findings of fact and the
recommendations of the Disciplinary Committee and shall be signed by the
chairman and the members of the Disciplinary Committee.

(2) The *report of the Disciplinary Committee* together with the record of the
investigation proceedings shall *be sent to the Director within two months* from the

date of the appointment of the Disciplinary Committee.

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(3) The period prescribed in subrule (2) may, upon an application in writing made by the chairman of the Disciplinary Committee, *be extended by the chairman of the Disciplinary Board if there exists reasonable grounds to do so.* (Emphasis added.)

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[17] As the word 'shall' is used with respect to the time frame for the DC to send its report to the director ie two months from the date of appointment of the DC, does it then mean that a decision of the DB based on such a report that was sent out of time, would be null and void as being made out of jurisdiction? In other words, does its non-compliance go towards jurisdictional invalidity? Is non-compliance with this procedural time frame merely to be frowned upon or is it fatal?

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[18] In *Sri Palmar Development & Construction Sdn Bhd v Jurukur Perunding Services Sdn Bhd* [2010] 6 MLJ 166 at pp 172–173, the question was asked as follows:

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[10] What does the word 'shall' mean? Is it more akin to and indeed amounting to a 'must' or can it be a mere 'may'? Must the word 'shall' mean a mandatory 'must' or may it mean a directory 'may'? I am reminded of the verbal exchange in Lewis Carroll's *Through the Looking Glass*:

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'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'

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[11] I agree that generally the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands, as per Hidayatullah J in *Sainik Motors v State of Rajasthan* AIR 1961 SC 1480. Similarly, in *State of Uttar Pradesh v Babu Ram* AIR 1961 SC 751, Subbarao J stated:

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When a statute uses 'shall' prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute.

[12] In the Privy Council case from Nova Scotia in *Vita Food Products, Incorporated v Unus Shipping Company, Limited (in liquidation)* [1939] AC 277, Lord Wright stated at p 293:

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Illegality is a concept of so many varying and diverse applications, that in each case it is necessary to scrutinize the particular circumstances with precision in order to determine if there is illegality and if so what is its effect. As Lord Campbell said in reference to statutory prohibition in *Liverpool Borough Bank v Turner* (1860) 2 De GF & J 502 at p 507:

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No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of

- A courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.
- ... Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.
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- C [19] In NS Bindra's *Interpretation of Statutes* (9th Ed) at p 950, it is stated that:
- The ultimate rule in construing auxiliary verbs like 'may' and 'shall' is to *discover the legislative intent*; and the use of words 'may' and 'shall' is not decisive of its discretion or mandates. The use of the words 'may' and 'shall' may help the courts in ascertaining the legislative intent without giving to either a controlling or a determining effect. The courts have further to consider the *subject matter*, the *purpose of the provisions*, the *object intended to be secured by the statute* which is of prime importance, as also the actual words employed. (Emphasis added.)
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- E [20] There are of course certain time frames that are mandatory such as was observed in *Majlis Peguam & Anor v Tan Sri Dato' Mohamed bin Yusoff Mohamed* [1997] 2 MLJ 271 at p 295; [1997] 3 CLJ 332 at p 358 by His Lordship Mohd Azmi FCJ:
- F In *Majlis Peguam Malaysia v Au Kong Weng Joseph* [1993] 2 MLJ 57, the Supreme Court had to decide whether the time limits imposed by ss 98 and 99 of the Act with regard to the various steps to be taken in considering a complaint against an advocate and solicitor are mandatory, and if so, whether proceedings under the Act against him, including the appointment of the disciplinary committee, in breach of these time limits were incurably illegal, void and of no effect. The Supreme Court answered these questions — quite correctly, if I may say so — in favour of the advocate and solicitor concerned for reasons which appear sufficiently in its judgment.
- G
- H [21] The problem in determining to what extent the use of the auxiliary verb 'shall' in a statute conveys 'mandatoriness' has been highlighted in a number of cases. Unlike 'must' and 'may' which are at the extreme in the continuum of mandatoriness with 'must' denoting maximum mandatoriness and 'may' maximum discretion and hence merely directory, 'shall' is smacked in the middle of the scale. In *R v Soneji and another* [2005] UKHL 49, the problem was summarised as follows:
- I 14 A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory

requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. A brief review of the earlier case law is to be found in *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, 1294D–1295H.

[22] Lord Steyn, in writing the judgment of the House of Lords, traced a brief history of the development of the approach taken with respect to the auxiliary verb ‘shall’ when interpreting statute. The trend is that the distinction between ‘mandatory and directory’ has been found to be unhelpful and in its place, one is to look at the scope of the statute and its object and determine if non-compliance with the time frame may be forgiven or is it fatal such that it goes towards jurisdiction, rendering the proceeding null and void. His Lordship continued thus:

15 In *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 189E–190C Lord Hailsham put forward a different legal analysis:

When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like ‘mandatory,’ ‘directory,’ ‘void,’ ‘voidable,’ ‘nullity,’ and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp

- A them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory
- B jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind.
- C This was an important and influential dictum. *It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity.* In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the
- D ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament. (Emphasis added.)

[23] His Lordship Lord Steyn analysed the case of *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 as follows:

- E 16 In *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, in an appeal from Hong Kong, the Privy Council followed and applied the dictum of Lord Hailsham in *London & Clydeside Estates*. At first instance the judge found that the deputy commissioner lacked jurisdiction to make two determinations since he had not done so within a reasonable time required by the imperative language of
- F the statute. The Court of Appeal reversed the decision. On appeal the Privy Council dismissed the appeal on two grounds. First, the Privy Council found on the facts that the determinations were made within a reasonable time. Secondly, on the assumption that there had been a breach of the time limit, the Privy Council held that the deputy commissioner had not been deprived of his jurisdiction. After reviewing earlier case law Lord Slynn of Hadley, giving the judgment of the Privy Council, observed (at 1296D):
- G ... Their Lordships consider that when a question like the present one arises — an alleged failure to comply with a time provision — it is simpler and better to avoid these two words ‘mandatory’ and ‘directory’ and to ask two questions. The first is whether the Legislature intended the person making the determination to
- H comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?
- I In the present case the Legislature did intend that the commissioner should make his determination within a reasonable time. ... If the commissioner failed to act within a reasonable time he could be compelled to act by an order of mandamus. *It does not follow that his jurisdiction to make a determination disappears the moment a reasonable time has elapsed. If the court establishes the time by which a reasonable time is to be taken as having expired, which will depend on all*

the circumstances, including factors affecting not only the taxpayer but also the Inland Revenue, it would be surprising if the result was that the commissioner had jurisdiction to make the determination just before but not just after that time. Their Lordships do not consider that that is the effect of a failure to comply with the obligation to act within a reasonable time in the present legislation. Such a result would not only deprive the government of revenue, it would also be unfair to other taxpayers who need to shoulder the burden of government expenditure; the alternative result (that the commissioner continues to have jurisdiction) does not necessarily involve any real prejudice for the taxpayer in question by reason of the delay. (Emphasis added.)

[24] Perhaps the next case analysed by Lord Steyn would be more relevant to the present case, the context being the non-compliance with time limits laid down by regulations dealing with discipline and misconduct. His Lordship continued as follows:

17 *Charles v Judicial Legal Service Commission* [2003] 1 LRC 422 involved an appeal from Trinidad and Tobago. It is a decision of some importance. The case concerned the effect of failures to observe time limits laid down by regulations dealing with discipline and misconduct in the public service. Giving the judgment of the Privy Council Tipping J (of the New Zealand Court of Appeal) observed, at pp 428–429, para 12:

At the outset Their Lordships observe that it seems highly unlikely that the Commission can have intended that breaches of time limits at the investigation stage would inevitably prevent it from discharging its public function and duty of inquiring into and, if appropriate, prosecuting relevant indiscipline or misconduct. A self-imposed fetter of such a kind on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime.

[25] He added at p 430, para 17:

... If a complaint is made about the non-fulfilment of a time limit the giving of relief will usually be discretionary. This discretionary element to which Lord Haisham referred (in the *London & Clydeside Estates* case) underlines the fact that problems arising from breach of time limits and other like procedural flaws are not generally susceptible of rigid classification or black and white a priori rules. With this in mind Their Lordships note that in the present case the delays were in good faith, they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no fair trial considerations were or could have been raised, and no fundamental human rights are in issue.

[26] Lord Steyn proceeded to consider another House of Lords case:

18 There is also subsequent House of Lords authority to similar effect: *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91. In imperative language Parliament had provided that if a defendant is cleared of an offence fingerprints or samples taken from him in the investigation of the offence must be destroyed. There

A was a breach of the duty. A DNA profile obtained from swabs taken from a rape victim was found to match that of the defendant. He was charged and convicted. The Court of Appeal quashed the conviction. The House of Lords reversed the decision of the Court of Appeal. The House declined to apply the mandatory/directory distinction. Instead the House adopted the reasoning of Lord Hailsham, concentrated on the consequence of non-compliance, and addressed the question what in the light of the consequences must Parliament be taken to have been intended. The House held that the Parliamentary intent would have been inimical to holding that the prosecution was invalid: see my judgment, at pp 117–118; Lord Cooke of Thorndon, at pp 120–121; and Lord Clyde, at p 121. Lord Hobhouse of Woodborough agreed, at pp 125–126. Lord Hutton concurred in the result. This decision involved a rejection of the mandatory/directory distinction in the face of explicit imperative language. It is a strong decision.

D [27] As pointed out by Lord Steyn, the trend was also discernible in the courts of New Zealand, Australia and Canada where parallel developments took place. In *New Zealand Institute of Agriculture Science Inc v Ellesmere County* [1976] 1 NZLR 630. Cooke J (subsequently Lord Cooke of Thorndon) speaking for the court said, at p 636:

E Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance.

F [28] In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 the Australian High Court addressed the same problem. In the joint judgment of McHugh, Gummow, Kirby and Hayne JJ the court concluded, at para 93:

G In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the ‘elusive distinction between directory and mandatory requirements’ and the division of directory acts into those which have substantially complied with a statutory command and those which have not. *They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid.* The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. *A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.* This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. *In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute.* (Emphasis added.)

[29] Thus one must look at the overall scheme of the disciplinary procedure set up under the LPA. The whole scope of the part of the LPA on disciplinary procedure against an advocate and solicitor is to ensure that public interest is protected and that public confidence in the legal profession is not compromised. It is to ensure that the Bar sets for itself a high ethical standard and that errant lawyers are punished for their misconduct. Further in cases of grave misconduct, the DB may even suspend an advocate and solicitor from practice for a period of time and in the severest misconduct involving breach of trust especially of clients' money, a striking off the rolls is meted out.

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[30] Viewed in that context, the auxiliary verb 'shall' when used in the context of r 26(2) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules '... shall be sent to the Director within two months from the date of appointment of the DC' must be read as directory. The object of the LPA should not be allowed to be thwarted merely on ground of a failure of the DC to submit its report on time. It may be appreciated that the time frame itself under r 26(3) provides for extension of time by the chairman of the DB. If the time frame were mandatory, one would have expected the time frame for submission of the DC's report to be clearly spelt out in the Act rather than just in the Rules. However the LPA does not prescribe a fixed time frame for the report of the DC to be concluded and sent to the director. It was content to condescend to the expression to 'expeditiously report its findings to the Disciplinary Board' as is used in the LPA.

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[31] There is of course a need for urgency and promptitude and hence the expression 'expeditiously report its findings to the Disciplinary Board'. It preserves both fortitude and focus on its investigation and reporting and at the same time, maintains flexibility for there could be a myriad of reasons for delay. The legislative intent of the investigation and recommendation should not be skirted or stymied merely because it cannot be done in two months. While justice delayed is justice denied, justice hurried may lead to justice buried.

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[32] It of course could not use the word 'may' as it may then convey that the discretion is with the DC whether or not to submit its report. That was not the intention of the framers.

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[33] One can appreciate that time frame is important for work expands to fill the time allotted for it. The first tier of disciplinary structure is that of peer assessment, review and recommendation. Depending on the number of witnesses that may be called by the parties, the time frame of two months might well be exceeded. Getting the free dates of the members of the DC with respect to common dates available to all three members of the DC can be quite a challenge. The LPA enjoins the expeditious hearing of the complaint. The

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A Legal Profession (Disciplinary Proceedings), (Investigating Tribunal and Disciplinary Committee) Rules provide a time frame of two months with a proviso for extension of time. There can be a multitude of factors constraining an extension of time such as the number of witnesses to be called, the different allegations of misconduct, the non-availability of common free dates for all parties and their counsel, the delay in production of documents and witnesses and even the request of the respondent for adjournment until the criminal matter is disposed of if the complaint is also the subject of a prosecution in court by the public prosecutor as in this case.

C [34] Clearly no time frame was intended to be fatal for the period needed to hear parties might well vary from case to case and also depending on the free dates of counsel. Here there is a criminal element on the complaint made against the applicant and it makes sense as can be seen in the minutes of the DC at p 33 of the applicant's 'Hardcopies of Affidavits Filed' when even his counsel argued and persuaded the DC that its decision should be made after the High Court had heard the appeal.

E [35] It would also be apposite for us to look across the causeway to appreciate the approach taken by the Singapore High Court in the *Law Society of Singapore v Zulkifli bin Mohd Amin and another matter* [2011] 2 SLR 620 when confronted with a serious finding of misconduct of misappropriation of clients' money by an equity partner of a legal firm vis a vis a complaint of non-compliance with some procedural timelines in submitting of report from their Inquiry Committee to the Council of the Law Society of Singapore in the framework of disciplinary proceedings against errant lawyers in the Republic. One of the issues raised was the non-compliance by the Inquiry Committee of the timeline to submit its report to the council under s 87(1A) of their Legal Profession Act (Cap 161, 2009 Rev Ed) which reads:

G Where the Council has determined under subsection (1)(d) that a matter be referred back to the Inquiry Committee for reconsideration or a further report —

- H (a) the Council shall notify the Inquiry Committee accordingly;
- (b) the Inquiry Committee shall submit its response or further report to the Council within 4 weeks from the date of the Council's notification; and ...

[36] The Chief Justice Chan Sek Keong CJ who sat with two Court of Appeal judges in Andrew Phang Boon Leong and VK Rajah JA, in delivering the judgment of the High Court observed as follows:

I [38] With respect to Prof Tan's procedural arguments in relation to the 3rd charge against Sadique, we agreed that the *Law Society was in breach of both s 87(1A) and s 87(4) of the Act*. In relation to s 87(1A) of the Act, the Council received the further report only 22 days after the statutory period of four weeks had expired.

[39] However, *we could not agree with Prof Tan's argument that a breach of s 87(1A)(a)*

of the Act would disempower the Law Society from referring the matter to this court. Section 87(1A) of the Act merely sets timelines for certain actions to be taken by the Law Society in certain circumstances. *They were not meant to be condition precedents necessary for the exercise of the Law Society's powers to refer the findings of the DT to this court. The modern approach as to the effect of a breach of a statutory provision is not to treat every breach as a disempowering or invalidating event.* In *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR(R) 597, the Court of Appeal endorsed the modern approach in these words (at [21]):

The Judge applied this modern approach to statutory interpretation, which requires the court (see [43] of the GD):

... [to look] at the whole scheme and purpose of the Act and ...

[weigh] the importance of the particular requirement in the context of that purpose and [ask] whether the Legislature would have intended the consequences of a strict construction, having regard to the prejudice to private rights and the claims of the public interest (if any).

[40] The modern approach was further stated by Simon Brown LJ in *Ahmed v Kennedy* [2003] 1 WLR 1820 in the form of the following question (at [29]):

[D]oes this legislation on its true construction give the court a discretion to waive these petitioners' timeous non-compliance or must it be regarded as fatal to their proceedings?

[41] The question therefore was whether non-compliance with the time periods in s 87(1A) of the Act was fatal to the present proceedings. In our view, *the answer was 'no' as these provisions were enacted for the purpose of expediting the disposal of disciplinary proceedings* — see the Second Reading speech of the Minister for Law in Parliament when moving the amendment bill (Singapore Parliamentary Debates, Official Report (26 August 2008) vol 84 at col 3187). *The amendments were not enacted to put obstacles in the way of disciplining errant advocates and solicitors who were guilty of professional misconduct.* In this connection, we might add that counsel for the Law Society, instead of expressing his regret for the carelessness of the Law Society in this regard, and giving his assurance that such mistakes would not be made again, sought to argue that *Sadique had not suffered any prejudice as a result of the delay. We agreed with counsel's legal submission, but not with the moral sentiment in which it was made.*

[42] Similarly, the Law Society also breached s 87(4) of the Act in failing to inform Sadique of its decision to ask the IC for a further report on 6 July 2009, but this did not prevent the Council from convening a DT pursuant to s 87(2)(b) of the Act. Again, a breach of this nature was not regarded as serious since it did not prejudice the solicitor complained against. Nevertheless, it is not a desirable state of affairs that the Law Society, the statutory governing body of the profession, should find itself unable to comply with simple statutory requirements, since it reflects a lack of the same degree of professional standard that it expects of its members. As disciplining errant lawyers is one of the most important statutory functions of the Law Society, *the Council should ensure that this function is carried out expeditiously and properly and we trust that such a breach will not recur in the future.* (Emphasis added.)

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A [37] In *Charles v Judicial and Legal Service Commission & Anor* (Jamaica) [2002] UKPC 34 (20 May 2002), Justice Tipping observed as follows:

B 2. ... She was one day late in giving the appellant the required written notice inviting him to give an explanation concerning the matters under investigation It is only the time point which was raised on the appeal. Regulation 90(5) required the investigating officer, with all reasonable dispatch, but not later than 21 day as from the date of her appointment to forward to the Commission, for its information, all original statements and all relevant documents together with her own report. In the present case, for reasons Their Lordships will mention below, the Master did not submit her report within this timeframe. No extension of time was sought. For this reason Their Lordships do not consider it necessary to discuss regulation 90(5)(a) introduced in mid 1998 providing for extensions of time. Under regulation 90(6) the Commission was obliged to consider the report of the investigating officer and any explanation given by the person under investigation and then to decide whether that person should be charged ...

D 18 Bearing in mind the relevant aspects of regulation 90 and its regulatory environment, and the other relevant circumstances of the case, including the lack of significant impact of the time defaults on the appellant, Their Lordships came to the clear view that the regulations cannot have been framed with the intention that breaches of the kind in issue would deprive the Commission of jurisdiction to act as it thought fit on the investigating officer's report and thereby fulfil its public responsibilities.

F [38] The Privy Council took into consideration the public interests element of having matters of indiscipline and misconduct effectively investigated and dealt with and that breach of time limit was not intended to lead to the frustration of that ultimate purpose. The Privy Council opined as follows:

G 12 The terms of regulation 90 have already been set out. At the outset Their Lordships observe that *it seems highly unlikely that the Commission can have intended that breaches of time limits at the investigation stage would inevitably prevent it from discharging its public function and duty of inquiring into and, if appropriate, prosecuting relevant indiscipline or misconduct.* A self imposed fetter of such a kind on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime. The proposition that this was intended is also hard to reconcile with the then existence of s 129(3) precluding inquiry into procedural irregularities not of a fundamental kind (see *Thomas v Attorney-General of Trinidad and Tobago* [1982] AC 113 PC)

I 13 The same picture emerges when reference is made to the text of regulation 90 and subsequent regulations. Regulations 90(1), 90(4) and 90(5) all use the phrase 'for the information of the Commission', thereby underlining that the inquiry function of the investigating officer is to gather material to enable the Commission to discharge its task of deciding whether the officer under investigation should be charged. Although *the time limits in regulation 90 are incidentally of benefit to that officer, their Lordships' view them as designed primarily to expedite the investigation process for the benefit of the public interest in having matters of indiscipline or misconduct effectively investigated and dealt with.* This makes it unlikely that breach

of a time limit was intended to lead to the frustration of that ultimate purpose. (Emphasis added.)

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[39] Likewise under the scheme of discipline and investigation into misconduct under the LPA, the time limits set for various stages of investigation are designed not to fetter its public purpose but to facilitate a speedy process of fact-finding and investigation so that the DB, being properly appraised, may proceed to mete out the necessary punishment for misconduct. The delay does not in any way prejudice the applicant who continued to practise law as he applied for and was given the *sijil* annual throughout that period of hearing of the DC from 2010 to its report in 2013. In fact, such a state of affairs suited the applicant well as his practice could go on uninterrupted and the criminal trial could proceed to conviction and then to appeal until he had exhausted all avenues of appeal. He had apparently applied for and obtained a stay of execution of his sentence whilst pursuing his appeal against the criminal conviction. It is a case of not just merely innocent until proven guilty but innocent until proven guilty and all avenues of appeal have been exhausted!

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[40] It was after all avenues of appeal had been exhausted that finally he had to serve sentence, which he did for six months. I am sure if the DB had wanted to proceed when he had obtained a stay of the sentence, he would have objected on ground that if he should succeed on appeal, he would have suffered a severe prejudice especially if the DB had found him guilty and suspended him from practice for a period of time. Upon his release, the complaint was more than ripe for disposal, for by then the applicant had no good excuse that he might well succeed on appeal against his conviction by the sessions court.

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[41] As for the complaint hanging over his head, this must be considered to have been subsumed into the graver offence of a charge and conviction hanging over his head. There was no letter produced to show that the applicant had wanted the decision to be expedited so that he would know his fate. Further there was no objection whatsoever from the applicant that the DC's report must be completed as soon as possible or else he would have been prejudiced. On the contrary, the reverse is true. It was minuted as follows by the DC in its report at p 2 (p 33 of encl 16) as follows:

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Submission by Respondent's Solicitors

— I humbly submitted that this committee should make a decision after the decision of the appeal. What transpired in Court is important for Respondent.

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[42] The respondent there was of course the applicant here. Both the seriousness of the offence or misconduct complained against and the fact that the criminal trial and appeal for the same offence was proceeding in the

- A criminal court, would justify a relaxation of the strict time frame for the submission of the report to the director. This is a case where if the chairman of the DC had applied to the DB for extension of time, the extension would in any event be given. The delay was in the investigative arm of the DB in the DC making its findings of fact and recommendations and not in the DB, the decision-maker itself making the decision. It was a delay attributed to the respondent below in asking for a withholding of the report of the DC to the DB until he had exhausted all avenues of appeal. It suited the respondent below well as he was pursuing his appeal against his criminal conviction and at the same time he could continue with his practice. He is in the circumstance, estopped from raising the complaint that the report of the DC is null and void for having been submitted beyond the two months' period.

D *Whether the DC's report is bad in law in that the chairman's and members' term of office had expired by the time they signed the report*

- E [43] The chairman of the DC signed the report to the DB on 15 March 2013 for a report concluded on 13 August 2010. By the date of the signing of the report the chairman's term of office as a member of the DC had already expired together with that of the other two members of the DC. They were appointed on 3 May 2010 and their term had expired on 2 May 2012. There was no evidence that they had been reappointed or had their term extended for a further term not exceeding two years. Section 96 of the LPA reads as follows:

- F 96 Appointment of Disciplinary Committee Panel
(1) The Disciplinary Board shall, from time to time as may be required, appoint a Disciplinary Committee Panel, from a list supplied by the Bar Council, comprising thirty members of whom twenty members shall be advocates and solicitors of not less than ten years' standing and having valid practising certificates and ten members who are lay persons:

- G Provided that the Disciplinary Board may, whenever it deems it necessary or expedient, and after consulting the Bar Council, vary the number of members of the Disciplinary Committee Panel. Any variation of the number of members shall be in the same proportion of advocates and solicitors and lay persons as described above.

- H (2) Every member of the Disciplinary Committee Panel shall serve for *two years*:
Provided that the Disciplinary Board *may extend his term for a period not exceeding a further two years* or reappoint him. (Emphasis added.)

- I [44] Rule 26 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, provides as follows:

(1) The report of the Disciplinary Committee shall state the *findings of fact* and the *recommendations* of the Disciplinary Committee and *shall be signed by the chairman and the members of the Disciplinary Committee*. (Emphasis added.)

[45] As r 26(1) requires the chairman of the DC and its members to sign the report, they would be obliged statutorily to sign it. It is a report and not the coercive order of any board or tribunal. The report remains that of the DC and the members who signed it had vouched for the truth of what is stated in the report. It is at most a recommendation and it is still left to the DB to accept, reject or accept in part the recommendation. It is not binding on the DB and it does not make decisions but merely findings and recommendations. Section 103D of the LPA sets out what the DB may do with the report of the DC:

Consideration by the Disciplinary Board of the report of the Disciplinary Committee

(1) After consideration of the report of the Disciplinary Committee, the *Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee.*

(2) The Disciplinary Board may in appropriate cases *impose a greater punishment than that recommended* by the Disciplinary Committee.

(3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

(4) Before the Disciplinary Board makes an order under subsection

(2) or any order that is likely to be adverse against an advocate and solicitor under subsection (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

(5) Where the Disciplinary Board makes an order that the advocate and solicitor should make restitution to the complainant of any sum found due and owing to the complainant, it may stipulate the time within which such restitution ought to be made, failing which the Disciplinary Board may impose on the advocate and solicitor a higher punishment than that previously imposed.

(6) A sum ordered by the Disciplinary Board under subsection (5) to be restituted may be recoverable by the complainant as a civil debt. (Emphasis added.)

[46] In that sense it does not become void if a member of the DC or even all its members have ceased to be members when the report was signed off. What is important is that the chairman and the members of the DC had valid appointment and authority when they heard the complainant and the respondent below. There was no suggestion that their term had expired when they heard the parties and completed their investigation. Even in a case of incapacity of a member of the IT of DC, any delay in the beginning or completion of any investigation shall not render void any hearing or any investigation, report or recommendation made by the IT or DC, as the case may be under r 27 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994.

A [47] It is unlike that of a judgment or order of a court where there is a need for saving provisions when a decision is made in the form of a judgment or order when one of its members has retired from office. One such provision is under s 72 of the Courts of Judicature Act 1961. It reads:

B (1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

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(2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.

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[48] I would thus hold that the DB was perfectly entitled to consider the report and recommendation of the DC which investigation was completed during the period of validity of their appointments as members of the DC though their term had expired when they signed off the report. The DB did not cease to have jurisdiction to consider the said report of the DC which was in the nature of a recommendation based on findings of fact that the members of the DC had vouched for.

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F *Whether the DB had acted ultra vires in acting under s 94(3)(a) of the LPA when the conviction was not the subject of the complaint*

[49] It is true that at the point of complaint, the criminal charge against the applicant had not been proceeded with to conclusion by the public prosecutor. There is also some evidence that the applicant himself as respondent below, had through his counsel, applied before the DC for its findings and recommendations to be deferred until he had exhausted all avenues of appeal. It was only after the applicant had been convicted and exhausted all avenues of appeal and had served his sentence, that the DC was alerted to the fact that it had yet to submit its report to the DB.

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[50] It was clear that the complaint was with respect to the conduct of the applicant in deceiving the sessions court judge with respect to the identity of the accused person that the applicant was representing before the sessions court judge. By the time the DB heard the applicant, the complaint had crystallised into a conviction. It was clear in the recommendations of the DC that one of the issues is whether the respondent below had been guilty in attempting to deceive the sessions court judge by allowing another person to impersonate as the accused person. See p 34 of encl 16.

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[51] The findings of fact of the DC had not changed but is now further supported by the conviction of the charge preferred against him by the public prosecutor. There was thus nothing wrong for the DB to notify the respondent below to submit on s 94(3)(a) of the LPA. Section 94(1), (2), (3)(a) read as follows:

94 Power of Disciplinary Board to strike off the Roll, suspend for misconduct, etc.

(1) All advocates and solicitors shall be subject for the purposes of all disciplinary actions to the control of the Disciplinary Board.

(2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to one or more of the following penalties or punishments:

- (a) to be struck off the Roll;
- (b) to be suspended from practice for any period not exceeding five years;
- (c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or
- (d) to be reprimanded or censured.

(3) For the purposes of this Part, 'misconduct' means conduct or omission; to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes —

- (a) conviction of a criminal offence which makes him unfit to be a member of his profession.

[52] It was perfectly proper for the DB to have written to the respondent below to ask for representation under s 94(3)(a) of the LPA. The DB had heard the respondent through his counsel and as the conviction was a further progression from the complaint lodged and as the respondent had been given every opportunity to submit on it, it cannot be argued that the DB had acted *ultra vires*. I am sure if the respondent below had been acquitted, he would also want to be heard with respect to that progression following from the complaint made. In a case of a complaint on the criminal conduct of a lawyer and by the time the DB hears the complaint, the respondent below had been convicted, it is both relevant and reasonable for the DB to ask for representation against the respondent under s 94(3)(a) of the LPA. It is not a fresh complaint but a complaint that had its genesis in what happened in court which conduct had graduated to a charge and subsequently a conviction. To say that the DB can only decide on the complaint on the conduct of the respondent below without wanting to take into consideration the subsequent conviction, is to allow for artificial compartmentalisation of the conduct of the lawyer complained against when in reality the same conduct had evolved into a conviction with no change in substance.

[53] There is no basis for arguing then that the DB had by so considering the conviction, acted *ultra vires*. The conduct complained of is the self-same conduct which had reached fruition in a conviction. It is not a different

A complaint but the same complaint that has now a different dimension added with a conviction. The ingredients of the complaint have not changed but the label has with the conviction under the law.

B *Whether the punishment imposed by the DB should in the circumstances of the case be interfered with*

C [54] The settled principle is that the court should not ordinarily substitute its sentence for that meted out by the disciplinary board of a professional body. One is familiar with the dicta in *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341 at p 345; [1998] 4 CLJ 878 at p 879 where Gopal Sri Ram JCA (later FCJ) observed as follows:

D It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior ...

E [55] Further at p 345 (MLJ); p 881 (CLJ):

F It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the *Guide to the Professional Conduct of Solicitors* issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:

G One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

H In our judgment, a court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

I [56] Likewise in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153 at p 157, His Lordship Peh Swee Chin FCJ noted as follows:

The Court of Appeal of England reaffirmed the principle of a disciplinary tribunal of a professional body being the best persons to judge the seriousness of professional

misconduct and that it would require an exceptional case to enable a court to interfere with their decision on the punishment ...

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[57] Long delays in wrapping up investigation by a disciplinary body tasked to do so may prejudice the professional complained against in some circumstances. Such a longish time was lambasted in *Dato Dr Henry Ooi Kwee Lim v Majlis Perubatan Malaysia* [2013] 8 MLJ 151 at p 154 by Abang Iskandar J as follows:

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... With all due respect, this court cannot accept the longish time taken to convene the PIC as following within the four walls of what is reasonably understood as convenient speed. There has been grave procedural unfairness caused by such delay. This complaint involved the issue of livelihood of the appellant and his constitutional right under art 5 of the Federal Constitution had been adversely affected. Coupled with the fact that material witness had become 'unavailable' had seriously prejudiced the appellant.

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[58] However the delay here does not fall under the above category. Be that as it may, the DB must take some blame and responsibility for not pursuing with all due diligence the serious complaint lodged with it. There could have been a more focused attention given to the whole process of investigation and a proper monitoring of the progress of the criminal case which outcome would impinge on and impact the complaint made. Whilst the applicant cannot be said to have been prejudiced because he continued to be able to practise law throughout the period of the investigation, the long delay is regrettable nevertheless. It is a hovering of the complaint over one's head which is heavy on one's heart and as such a certain discount ought to have been given to the applicant.

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PRONOUNCEMENT

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[59] Looking at the overall circumstance of this case and especially the seriousness of the complaint, I am not constrained to disturb the finding of misconduct by the DB. The grave misconduct has obscured the governing time frame for the DC report. Public interest has come to the fore such that delay in the DC's report pales in substance and significance.

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[60] I would ordinarily not disturb the punishment imposed as the DB consisting of members of the profession who are the best persons to set the standard and to determine what is appropriate punishment for the misconduct.

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[61] However, as stated above, it cannot be denied that there should have been better focus on the investigation at both the IT and DC stage such that the complaint should have been expeditiously investigated into. It cannot be

A denied that the IT and DC have both contributed to the delay in furnishing their respective reports. In the circumstance I had varied the 12 months suspension to six calendar months and it shall commence 14 days from the date of the order. I exercised my discretion and make no order as to costs.

B [62] The applicant had applied orally for a stay of the order of this court on his undertaking to file the appeal against this decision before the time limited for appeal is up. Mr G Shanmugam for the Bar Council had no objection to the stay pending the disposal of the appeal from this decision. I had thus allowed stay of this order pending appeal which has since been filed.

C *Order accordingly.*

Reported by Afiq Mohamad Noor

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